



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 713

[EPA-HQ-OPPT-2017-0421; FRL-8523-02-OCSPP]

RIN 2070-AK93

### Response to Vacatur of Certain Provisions of the Mercury Inventory Reporting Rule

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is revising regulations associated with persons who must report data to the Agency’s mercury inventory established under the Toxic Substances Control Act (TSCA). Those reporting requirements were set forth in a final rule entitled “Reporting Requirements for TSCA Mercury Inventory: Mercury” (hereafter “mercury inventory reporting rule”). These revisions implement an order issued by the United States Court of Appeals for the Second Circuit (Second Circuit), on June 5, 2020.

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2017-0421, is available at <https://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave., NW., Washington, DC. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280.

Due to the public health concerns related to COVID-19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Thomas Groeneveld, Existing Chemicals Resource Management Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-1188; email address: *groeneveld.thomas@epa.gov*.

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: *TSCA-Hotline@epa.gov*.

## **SUPPLEMENTARY INFORMATION:**

### **I. Executive Summary**

#### *A. Does this Action Apply to Me?*

You may be potentially affected by this action if you import mercury-added products. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include the following:

- Gold ore mining (NAICS code 212221).
- Lead ore and zinc ore mining (NAICS code 212231).
- All other metal ore mining (NAICS code 212299).
- Asphalt shingle and coating materials manufacturing (NAICS code 324122).
- Synthetic dye and pigment manufacturing (NAICS code 325130).
- Other basic inorganic chemical manufacturing (NAICS code 325180).
- All other basic organic chemical manufacturing (NAICS code 325199).
- Plastics material and resin manufacturing (NAICS code 325211).
- Pesticide and other agricultural chemical manufacturing (NAICS code 325320).
- Medicinal and botanical manufacturing (NAICS code 325411).
- Pharmaceutical preparation manufacturing (NAICS code 325412).
- Biological product (except diagnostic) manufacturing (NAICS code 325414).

- Paint and coating manufacturing (NAICS code 325510).
- Adhesive manufacturing (NAICS code 325520).
- Custom compounding of purchased resins (NAICS code 325991).
- Photographic film, paper, plate, and chemical manufacturing (NAICS code 325992).
- All other miscellaneous chemical product and preparation manufacturing (NAICS code 325998).
- Unlaminated plastics film and sheet (except packaging) manufacturing (NAICS code 326113).
- Unlaminated plastics profile shape manufacturing (NAICS code 326121).
- Urethane and other foam product (except polystyrene) manufacturing (NAICS code 326150).
- All other plastics product manufacturing (NAICS code 326199).
- Tire manufacturing (NAICS code 326211).
- All other rubber product manufacturing (NAICS code 326299).
- Iron and steel mills and ferroalloy manufacturing (NAICS code 331110).
- Rolled steel shape manufacturing (NAICS code 331221).
- Alumina refining and primary aluminum production (NAICS code 331313).
- Secondary smelting and alloying of aluminum (NAICS code 331314).
- Nonferrous metal (except aluminum) smelting and refining (NAICS code 331410).
- Secondary smelting, refining, and alloying of nonferrous metal (except copper and aluminum) (NAICS code 331492).
- Iron foundries (NAICS code 331511).
- Steel foundries (except investment) (NAICS code 331513).
- Fabricated structural metal manufacturing (NAICS code 332312).
- Industrial valve manufacturing (NAICS code 332911).
- Ammunition except small arms manufacturing (NAICS code 332993).

- Small arms, ordnance, and ordnance accessories manufacturing (NAICS code 332994).
- All other miscellaneous fabricated metal product manufacturing (NAICS code 332999).
- Food product machinery manufacturing (NAICS code 333294).
- Office machinery manufacturing (NAICS code 333313).
- Other commercial and service industry machinery manufacturing (NAICS code 333319).
- Heating equipment (except warm air furnaces) manufacturing (NAICS code 333414).
- Air-conditioning and warm air heating equipment and commercial and industrial refrigeration equipment manufacturing (NAICS code 333415).
- Pump and pumping equipment manufacturing (NAICS code 333911).
- Bare printed circuit board manufacturing (NAICS code 334412).
- Semiconductor and related device manufacturing (NAICS code 334413).
- Other electronic component manufacturing (NAICS code 334419).
- Electromedical and electrotherapeutic apparatus manufacturing (NAICS code 334510).
- Search, detection, navigation, guidance, aeronautical, and nautical system and instrument manufacturing (NAICS code 334511).
- Automatic environmental control manufacturing for residential, commercial, and appliance use (NAICS code 334512).
- Instruments and related products manufacturing for measuring, displaying, and controlling industrial process variables (NAICS code 334513).
- Totalizing fluid meter and counting device manufacturing (NAICS code 334514).
- Instrument manufacturing for measuring and testing electricity and electrical signals (NAICS code 334515).
- Analytical laboratory instrument manufacturing (NAICS code 334516).
- Watch, clock, and part manufacturing (NAICS code 334518).
- Other measuring and controlling device manufacturing (NAICS code 334519).

- Electric lamp bulb and part manufacturing (NAICS code 335110).
- Commercial, industrial, and institutional electric lighting fixture manufacturing (NAICS code 335122).

- Other lighting equipment manufacturing (NAICS code 335129).
- Electric house wares and household fan manufacturing (NAICS code 335211).
- Household vacuum cleaner manufacturing (NAICS code 335212).
- Household cooking appliance manufacturing (NAICS code 335221).
- Household refrigerator and home freezer manufacturing (NAICS code 335222).
- Household laundry equipment manufacturing (NAICS code 335224).
- Other major household appliance manufacturing (NAICS code 335228).
- Switchgear and switchboard apparatus manufacturing (NAICS code 335313).
- Relay and industrial control manufacturing (NAICS code 335314).
- Primary battery manufacturing (NAICS code 335912).
- Current-carrying wiring device manufacturing (NAICS code 335931).
- All other miscellaneous electrical equipment and component manufacturing (NAICS code 335999).

- Automobile manufacturing (NAICS code 336111).
- Light truck and utility vehicle manufacturing (NAICS code 336112).
- Heavy duty truck manufacturing (NAICS code 336120).
- Motor home manufacturing (NAICS code 336213).
- Travel trailer and camper manufacturing (NAICS code 336214).
- Other aircraft parts and auxiliary equipment manufacturing (NAICS code 336413).
- Boat building (NAICS code 336612).
- Motorcycles and parts manufacturing (NAICS code 336991).
- Surgical and medical instrument manufacturing (NAICS code 339112).
- Costume jewelry and novelty manufacturing (NAICS code 339914).

- Game, toy, and children's vehicle manufacturing (NAICS code 339932).
- Sign manufacturing (NAICS code 339950).
- Other chemical and allied products merchant wholesalers (NAICS code 424690).
- Research and development in the physical, engineering, and life sciences (except biotechnology) (NAICS code 541712).
- Hazardous waste treatment and disposal (NAICS code 562211).
- Other nonhazardous waste treatment and disposal (NAICS code 562219).
- Materials recovery facilities (NAICS code 562920).
- National security (NAICS code 928110).

*B. What action is the Agency taking?*

In June 2018, EPA finalized a rule to require reporting from persons who manufacture (including import) mercury or mercury-added products, or otherwise intentionally use mercury in a manufacturing process (Ref. 1). That rule was challenged in the Second Circuit by the Natural Resources Defense Council and several state attorneys general in July 2018. Oral arguments were held on November 20, 2019, and the court issued its decision on June 5, 2020. The petitioners argued that three exemptions to the reporting requirements violated the statutory mandate within TSCA section 8(b)(10). The Agency argued that the three exemptions were lawful because EPA determined certain reporting to be duplicative or burdensome per existing EPA or other mercury-related reporting requirements. Duplicative or overly burdensome reporting requirements are prohibited under TSCA section 8(a)(5). The Agency prevailed on two issues, but the Second Circuit vacated the exemption at 40 CFR 713.7(b)(2) for persons who import pre-assembled products that contain a mercury-added component (Ref. 2). As a result, such persons are now required to report pursuant to 40 CFR 713.7(b). This rule is effectuating the vacatur ordered by the Second Circuit by making necessary amendments to the corresponding text in 40 CFR 713.7(b).

*C. What is the Agency's authority for taking this action?*

EPA is issuing this final rule pursuant to TSCA section 8(b)(10)(D) (15 U.S.C. 2607(b)(10)(D)), which authorizes EPA to require reporting in order to assist in preparing the inventory of mercury supply, use and trade in the United States. In addition, section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for revising these provisions without prior proposal and opportunity for comment, because these revisions simply undertake the ministerial task of implementing the court order vacating an exemption at 40 CFR 713.7(b)(2) and making the necessary amendments to corresponding text in 40 CFR 713.7(b). As a matter of law, the order issued by the Second Circuit on June 5, 2020 vacated the reporting exemption for persons who manufacture (including import) a mercury-added product where that person is “engaged only in the import of a product that contains a component that is a mercury-added product.” It is, therefore, unnecessary to provide notice and an opportunity for comment on this action, which merely carries out the court’s order.

*D. Which regulations is EPA removing and replacing?*

EPA is effectuating the Second Circuit vacatur of the exemption for persons who manufacture (including import) a mercury-added product where that person is “engaged only in the import of a product that contains a component that is a mercury-added product.” Therefore, the current text at 40 CFR 713.7(b)(2) will be removed and replaced (with appropriate textual and numbering updates) with the text currently found at 40 CFR 713.7(b)(3).

*E. What are the estimated burdens associated with the removed and replaced regulations?*

EPA has prepared an economic analysis of the potential impacts associated with this rulemaking (Ref. 3). This economic analysis estimates and evaluates the total costs and benefits for additional reporters to the mercury inventory reporting rule due to this rulemaking (i.e., those that import products that contain a component that is a mercury-added product). EPA is

considering an estimate of 756 as the number of sites potentially subject to the amended rule, which, under the revised requirements, is now applicable to imports of products that contain a component that is a mercury-added product. EPA estimates that as many as 657 sites will submit reports due to the revised requirements. This is the incremental difference between the number of actual reporters to the mercury inventory reporting rule during the 2019 submission period, and the expected number of total reporters based on the number of entities that report to the Interstate Mercury Education & Reduction Clearinghouse (IMERC) or to EPA's Chemical Data Reporting (CDR) or Toxics Release Inventory (TRI). More details on the methodology used can be found in the Agency's economic analysis (Ref. 3).

The chief benefit of the final rule is the collection of detailed data on mercury, which will serve as a basis to recommend actions to further reduce mercury use in the United States, as required at TSCA section 8(b)(10)(C). Another benefit is the use of information collected under the final rule to help the United States implement its obligations under the Minamata Convention, a multilateral environmental agreement that addresses specific human activities that are contributing to widespread mercury pollution. While there are no quantified benefits for the final rule, the statutory mandates at TSCA sections 8(b)(10)(C) and (D) (15 U.S.C. 2607(b)(10)(C) and (D)), specifically call for and authorizes a rule to support an inventory of mercury supply, use, and trade in the United States, to identify any manufacturing processes or products that intentionally add mercury, and to recommend actions to achieve further reductions in mercury use. As described in the Agency's economic analysis, unquantified benefits include providing increased information on mercury and assisting in the reduction of mercury use (Ref. 3). To the extent that the information gathered through this rule is used to reduce mercury use, benefits to society will result from a reduction in exposure.

- *Benefits:* The final rule will provide information on mercury and mercury-added products to which the Agency (and the public) does not currently have access. To the extent that the information gathered through this final rule is used to reduce mercury use,



benefits to society will result from a reduction in risk.

- *Costs:* Total reporter (industry) costs the first year were estimated in 2020\$ at \$5.1 million, and \$3.6 million in subsequent reporting years. Annualized over 10 years, the reporter costs are \$1.5 million at both 3% and 7% discount rates. Agency costs are \$729 per report per year, for an annualized cost of \$177,000 and \$181,000 at 3% and 7% discount rates, respectively. Therefore, the total annualized costs are expected to be approximately \$1.7 million at both 3% and 7% discount rates. The total burden of the rule is expected to be approximately 212,000 hours over the 10-year analysis period. These estimates include compliance determination, rule familiarization, CBI substantiation, electronic reporting, and recordkeeping, in addition to completing reporting requirements.

- *Small Entity Impacts:* The final rule will impact 203 companies that meet the U.S. Small Business Administration (SBA) definitions for their respective NAICS classifications. Among the total 657 sites regulated under the rule, EPA found that the costs of the rule exceed 3 percent of the value of sales for 2 small businesses, and an additional 3 small businesses may incur costs at between 1 and 3 percent of the value of sales. EPA is unable to determine whether these 5 small businesses actually import products that contain a component that is a mercury-added product.

- *Environmental Justice and Protection of Children:* The Agency believes that the information collected under this rule, if finalized, will assist EPA and others in determining the potential hazards and risks associated with elemental mercury and mercury compounds. Although not directly impacting environmental justice-related concerns, this information will enable the Agency to better protect human health and the environment, including in low-income and minority communities. The rule is directed at all mercury-added products that are manufactured or imported into the United States. All consumers of these chemicals and the products made from them and all workers who come into contact with these chemicals could benefit if data regarding the chemicals' health and environmental effects were developed.

Therefore, it does not appear that the costs and the benefits of the rule will be disproportionately distributed across different geographic regions or among different categories of individuals.

- *Effects on State, Local, and Tribal Governments:* Government entities are not expected to be subject to the rule's requirements, which apply to entities that manufacture (including import) mercury or mercury-added products, or otherwise intentionally use mercury in a manufacturing process. The final rule does not have a significant intergovernmental mandate, significant or unique effect on small governments, or have Federalism implications.

## II. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. "Reporting Requirements for TSCA Mercury Inventory: Mercury;" Final Rule. **Federal Register** (83 FR 30054, June 27, 2018) (FRL-9979-74).
2. United States Court of Appeals for the Second Circuit. *Natural Resources Defense Council, Inc. and State of Vermont v. United States Environmental Protection Agency*, 961 F.3d 160 (2d. Cir. 2020).
3. EPA. "Economic Analysis for the Final Rule on Revisions to the Reporting Requirements for the TSCA Mercury Inventory."

## III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

*B. Paperwork Reduction Act (PRA)*

The revised information collection activities in this rule have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.*, as part of a request to renew the existing approval under OMB Control No. 2070-0207. The renewal Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2567.04. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The revised information collection requirements are not enforceable until OMB approves them.

The ICR renewal request explains the necessary adjustments related to the Second Circuit vacatur. Applying the reporting requirements identified in the 2018 final rule to persons who manufacture (including import) a mercury-added product will provide EPA with more complete information necessary to prepare and periodically update an inventory of mercury supply, use, and trade in the United States, as required by TSCA section 8(b)(10)(D). These reporting requirements will help the Agency to prepare subsequent, triennial publications of the inventory, as well as to carry out the requirement of TSCA section 8(b)(10)(C) to identify any manufacturing processes or products that intentionally add mercury and recommend actions, including proposed revisions of Federal law or regulations, to achieve further reductions in mercury use. EPA intends to use information collected under the rule to assist in efforts to reduce the use of mercury in products and processes and to facilitate reporting on implementation of the Minamata Convention by the United States. Respondents may claim some of the information reported to EPA under the final rule as CBI under TSCA section 14. TSCA section 14(c) requires a supporting statement and certification for confidentiality claims asserted after June 22, 2016.

*Respondents/affected entities:* Manufacturers, importers, and processors of mercury and

mercury-added products.

*Respondent's obligation to respond:* Mandatory (15 U.S.C. 2607(b)(10)(D)).

*Estimated number of respondents:* 756.

*Frequency of response:* Triennially.

*Total estimated annual burden:* 17,348 hours (averaged over 3 years). Burden is defined at 5 CFR 1320.3(b).

*Total estimated annual cost:* \$1,384,999 (averaged over 3 years), includes \$0 annualized capital or operation and maintenance costs.

*Change in burden estimates:* Based on the numbers of reporters of mercury data to the IMERC Mercury-added Products Database, as well as EPA's TRI program and CDR rule, there will be a change in manufacturers (including importers) or processors that could respond to this information collection. The annual public burden for this collection of information is estimated about 23 hours per respondent. This request represents a decrease of 9 hours per respondent from that currently in the OMB inventory, or a total decrease of 20,522 hours (from 72,567 to 52,045 hours). This change reflects a decrease in rule familiarization burden, a decrease in form completion burden due to mercury export prohibitions, and changes in the number of estimated respondents.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves the renewal ICR, the Agency will announce that approval in the *Federal Register* and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

#### *C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA, 5 U.S.C. 601 *et seq.* The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any

other statute. This rule is not subject to notice and comment requirements because the Agency has invoked the APA “good cause” exemption under 5 U.S.C. 553(b).

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531 through 1538, and does not significantly or uniquely affect small governments. As such, the requirements of sections 202, 203, 204, or 205 of UMRA do not apply to this action.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have any effect on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in the Order. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy*

*Supply, Distribution, or Use*

This final rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not expected to affect energy supply, distribution, or use and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This action does not involve any technical standards. Therefore, section 12(d) of NTTAA, 15 U.S.C. 272 *note*, does not apply to this action.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

This action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This action establishes an information requirement and does not affect the level of protection provided to human health or the environment.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a major rule as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 713**

Environmental protection, Exports, Imports, Manufacturing, Mercury, Trade practices.

**Michael S. Regan**

*Administrator.*

Therefore, for the reasons set forth in the preamble, 40 CFR Chapter I is amended as follows:

**PART 713—REPORTING REQUIREMENTS FOR THE TSCA INVENTORY OF  
MERCURY SUPPLY, USE, AND TRADE**

1. The authority citation for part 713 continues to read as follows:

**Authority: 15 U.S.C. 2607(b)(10)(D).**

2. In § 713.7, paragraph (b) is revised to read as follows:

**§ 713.7 Persons who must report.**

\* \* \* \* \*

- (b) Any person who manufactures (including imports) a mercury-added product, except:
- (1) A person who does not manufacture (including import) a mercury-added product with the purpose of obtaining an immediate or eventual commercial advantage; or
  - (2) A person engaged only in the manufacture (other than import) of a product that contains a component that is a mercury-added product who did not first manufacture (including import) the component that is a mercury-added product; and

\* \* \* \* \*

[FR Doc. 2021-24209 Filed: 11/5/2021 8:45 am; Publication Date: 11/8/2021]